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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/603,343  
Filing Date: June 25, 2003  
Appellant(s): HOLMES ET AL.

\_\_\_\_\_  
Edward A. Squillante, Jr.  
For Appellant

### **EXAMINER'S ANSWER**

This is in response to the appeal brief filed July 7, 2008 appealing from the Final Office action mailed November 28, 2007.

#### **(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

#### **(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

#### **(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

#### **(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

#### **(5) Summary of Claimed Subject Matter**

The summary of the claimed subject matter contained in the brief is correct.

#### **(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

EP 0910956 A1	Carns et al	4-1999
US 6056949	Menzi et al.	5-2000

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

**Rejection Number 1**

Claims 1-4 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carns et al (EP 0910956A1).

Regarding claim 1, Carns et al, hereinafter Carns, teaches a method of making a combined tea product with a mixture of tea leaves and tea solids (Abstract) as instantly claimed. Carns teaches a method where tea solids are coated on the tea leaves. Carns reference further teaches that mixing the tea leaves and tea concentrate, i.e., spraying the tea concentrate onto the tea leaves and drying the leaves; can be done either simultaneously or in separate steps (Page 3, lines 42-44). Further the claim recitation of "Mixing leaf tea and tea solids derived from tea powders to produce a mixture; and simultaneously wetting and drying the mixture to produce the fabricated leaf tea product" as recited does not eliminate the possibility that the leaf tea and tea concentrate are mixed after each one is wetted separately but simultaneously and then combined and dried together or in some other order. The claim as recited does not clarify whether the mixture is a dry mixture or a wet mixture. Further it is also noted that the claim 1 as recited does not preclude soluble tea solids as taught by Carns. Carns further teaches that the tea concentrate, i.e., spraying the tea concentrate onto the tea

leaves and drying the leaves; either simultaneously or in separate steps (Page 3, lines 42-44). Carns teaches of a mixture of tea leaves with soluble tea solids in the tea product, thus teaching a fabricated combined tea product comprising tea leaves and tea solids as instantly claimed. Therefore, Carns teaches that the tea leaves and the soluble tea solids are wet together and are dried together as recited the method recited in amended claim 1.

Alternatively, the soluble tea solids are mixed with the liquid (water) and the mixture is sprayed over the fluidized bed containing tea leaves. Thus the reference teaches a combined tea product comprising tea leaves and soluble tea solid, where the soluble tea solids *may be* dissolved in water prior to forming the combined tea product (Page 3, line 42). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention that various methods of combining tea leaves and soluble tea solids may be used. Thus to modify Carns and combine the two components in the dry form and spray the dry mixture with water in order to make the combined tea product faster by eliminating the step of dissolving the tea solids would have been in the purview of one having ordinary skill in the art at the time of the invention. One would have been motivated to do so in order to economize on time, energy and equipment cost.

Regarding claim 2, Carns teaches about 5% -70% of tea powder in the tea product (Page 3, lines 46-47), which falls within the range of about 10% - 75% as instantly claimed.

Regarding claim 3, Carns teaches the final moisture content of the mixture of tea leaves and tea solids in the range of about 3-7% (Page 5, lines 30-31) which falls within the range of 3-8% as instantly claimed.

Regarding claim 4, Carns teaches that the coating process where the tea powder or concentrate is coated on tea leaves can be carried out in a fluidized bed drier (Page 3, lines 43-44), as instantly claimed.

Claim 9 recites that the fabricated leaf tea product gives an infusion under 10 to 15 seconds with water at a temperature range of 80-90 °C. Carns teaches that the combination tea product or fabricated tea product as recited, gives an infusion at 22°C for 90 seconds, and Lipton's tea bag (Bag A) gives a good color after 90 seconds at 75°C (pages 4, line 45 to page 5, line 10). Carns also teaches that the combined tea product as taught gives a darker color infusion than other bags at 22°C (Page5, lines 35 to 58). Thus the reference teaches of a strong infusion (0.8 Absorbance) from the combined tea product at room temperature in 90 seconds. The reference, however, is silent about an infusion in 10-15 seconds at 80-90°C. However, tea products are known to give some infusion in a few seconds after the addition of water. Further, the rate of infusion is known to increase as the temperature of water increases, i.e., tea infuses much faster in hot water as compared to cold water. Further, it was well known that tea-dispensing machines heat the water in the range of 80-90°C and infuse the tea for 10-15 seconds before dispensing, for example, as admitted by the applicant at page 7 (lines 27-30) of the specification. Therefore, based on the above teachings of a strong infusion at 22°C and the method of making the product (as taught by Carns), one of ordinary skill in the art at the time of the invention would expect that the fabricated leaf tea product taught by Carns will have similar properties of infusion, as recited in claim 9, absent any clear and convincing evidence or arguments to the contrary.

Applicant is reminded that where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of either anticipation or obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In re Spada, 911F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

Thus claims 1-4 and 9 as recited is obvious over Carns, absent any clear and convincing evidence and arguments to the contrary.

**Rejection Number 2**

Claims 5-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carns et al (EP 0910956A1) in view of Menzi et al (US 6056949).

Carns has been applied to claims 1-4 and 9, as discussed above.

Carns teaches a method of making a combined tea product with a mixture of tea leaves and tea solids as instantly claimed. Carns teaches the combining of tea solids or tea concentrate with tea leaves in a fluidized bed drier; however, the reference does not specify the temperature of the fluidized bed and of water or liquid used to wet the tea product as recited in claims 7-8 and 5-6 respectively.

Fluidized bed driers have been known in the art of drying foods including tea products. Menzi et al., hereinafter Menzi, teaches a process of making granulated flavorings including tea flavors (example 6) where the core material is vegetable matter such as tea powder. Menzi teaches the use of fluidized bed apparatus for coating the base material with flavors (column 1, line 61) by spraying and drying. The air temperature taught by Menzi for the coating and drying process ranges from about 30-80°C (column 2, lines 49-51), which includes the temperature range recited by the applicant in claims 7 and 8. Thus drying temperatures in the range recited by the applicant have been known to be employed for making combined tea products as taught by Menzi. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Carns and dry the combined tea product using the fluidized bed temperature range as taught by Menzi, in order to make the combined tea product at a suitable temperature without losing the flavor and aroma characteristics of tea product. One would have been further motivated to keep the temperature in the range taught by Menzi to produce a consistent product at an optimal rate.

Carns is silent regarding the temperature of water or liquid being sprayed on the tea product on the fluidized bed. However, Menzi teaches an optimal fluidized bed

temperature range of 30-80°C for coating food products, such as, tea. Menzi also teaches spraying as a method of coating the flavor on to the base material (tea), as discussed above. The temperature of the fluidized bed is kept relatively constant so that the drying/coating process runs at a uniform rate and the product quality is uniform. Thus, it would be a matter of routine determination for one of ordinary skill in the art at the time of the invention to raise the temperature of water or liquid to a desirable range, such as, closer to the air temperature taught by Menzi, i.e., in the range of 30-80°C, such that the temperature of the product in the fluidized bed does not change significantly as a result of spraying of water or a liquid coating material. If colder water were to be used to wet the tea product, it would require more energy and longer processing time to bring the temperature of the wet-tea product at par with the set temperature of the fluidized bed, i.e., 30-80°C, which will increase cost of making the product. The temperature range of 30-80°C, i.e., fluidized bed temperature range, also encompasses the range recited by the applicant in claims 5 and 6. Therefore, it would have been obvious to one with ordinary skill in the art to modify Carns and spray the tea with water or liquid that is heated to the temperature close to the temperature of the fluidized bed (i.e., 30-80°C) in order to facilitate maintenance of temperature of the fluidized bed between 30-80°C (as taught by Menzi). One would have been further motivated to have the temperature of spray water in the temperature range of the fluidized bed, at least for the purpose of making a consistent product faster and by making use of an energy efficient process. Therefore, the invention as recited in claims 5-8 is obvious over Carns, in view of Menzi, absent any clear and convincing evidence and arguments to the contrary.



### **(10) Response to Arguments**

For clarity, the heading for response to each argument below is the same as the heading (and its corresponding number) used by the appellant in the appeal brief.

#### **I. Rejection Under 35 USC 103**

On pages 7-9 of the appeal brief, appellant argues regarding the 35 USC 103 rejection of claims 1-4 and 9.

On page 8, last paragraph, first sentence, appellant argues that “the ‘956 reference is merely directed to a tea bag for ice tea beverages”. It appears that the appellant is implying that if tea is packaged in a “tea bag” or that the tea is suitable for “ice tea beverages”, it somehow makes the ‘956 reference not relevant. This argument is not persuasive. A “tea bag” is a packaging method and “ice tea” is a specific type of tea. Given that the appellant has neither claimed a packaging step or method, or any specific type of tea, any arguments (as above) regarding the packaging method or the use of a specific type of tea is moot.

On page 8, last paragraph, last two sentence, appellant argues that “The ‘956 reference does not, even remotely, describe a process where tea leaves and tea powder are simultaneously wetted and dried as a mixture” and that “the Examiner’s interpretation of the claims is not correct”. Again, on page 9, 1<sup>st</sup> paragraph, appellant argues that in the cited ‘956 reference “No mixture of tea leaf and tea powder is made wherein the resulting mixture is simultaneously wetted and dried as claimed in the present invention”. This argument is not persuasive. Carns (i.e. the ‘956 reference) teaches mixing leaf tea with tea solids (referred to as “soluble tea solids” by Carns) derived from tea powders to produce a mixture, and simultaneously wetting and drying the mixture (see Carns, page 3, lines 40-45). Note that Carns specifically mentions wetting and

drying of the mixture may be either simultaneously (as claimed in claim 1) or in separate steps (see page, 3, line 43 of Carns).

## II. Rejection Under 35 USC 103

On pages 9-12 of the appeal brief, appellant argues regarding the 35 USC 103 rejections of claims 5-8.

On page 10, lines 3-12 of the appeal brief, appellant describes examiner's use of '949 reference (i.e. Menzi reference) but does not present any specific argument against the Menzi reference. Appellant then presents arguments on page 10, lines 14-21 of the appeal brief, that are the same as those already addressed above (such as "simultaneously wetting and drying the mixture") with respect to 35 USC 103 rejection of claims 1-4 and 9 in view of '956 reference.

On page 11, lines 1-16 of the appeal brief, appellant points to some teachings of '956 reference without indicating what parts of the '956 reference teach that. Further, appellant does not present any specific argument, other than the argument in lines 13-16, which is related to "simultaneous wetting and drying" of mixture which has already been addressed above with respect to 35 USC 103 rejection of claims 1-4 and 9 in view of '956 reference.

On page 11, last paragraph and page 12, 1<sup>st</sup> paragraph of the appeal brief, appellant again provides an opinion on what '949 reference describes but does not present any specific argument, other than the argument on pages 12, lines 3-5, which is related to "simultaneous wetting and drying" of mixture which has already been addressed above with respect to 35 USC 103 rejection of claims 1-4 and 9 in view of '956 reference. Appellant does state that the '949 reference is "directed to a process for the preparation of spherical or substantially spherical aromatic and odoriferous granulated material which is free flowing" possibly alluding that the reference is not in a related field (see

page 11, last paragraph, 1st sentence of the appeal brief). In this context, it is noted (as pointed out in the rejection of claims 5 and 6) that one of the examples of the material of Menzi reference (example 6, see Col. 4, lines 50-67 of Menzi reference) is directed to a tea product, and is thus relevant.

**(11) Evidence Appendix**

None

**(12) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.  
Respectfully submitted,

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/Jyoti Chawla/

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